RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100853 SEPARATION DATE: 20021212

BOARD DATE: 20120524

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Soldier, SSG/E-6(13F, Fire Support NCO), medically separated for low back pain with L5-S1 HNP. The CI did not improve adequately with treatment to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Herniated nucleus pulposus L5/S1 w/sciatica on the left, was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated low back pain with L5-S1 HNP as unfitting, and rated it 10% with application of the US Army Physical Disability Agency (USAPDA) pain policy, DoDI 1332.39, and the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: The CI states: “The rating should be changed because the medical examiner conducting the physical examination did not consider the pain I was in during the exam when I forced myself to twist, bend, and walk. In addition, the severity of my condition prior to the examination was not considered as a result of me being reassigned to a new duty station (Fort Polk) and being seen by a different physician than the one that had diagnosed and treated me. The newly assigned physician did not have knowledge of daily symptoms and pain that disabled me from performing [*sic*] the daily duties of my occupation. Also my conditions of Degenerative Disc Disease, Lumbar Spine with Herniated Nucleus Pulposus L5-S1 and left Sciatica has worsen [*sic*] since my honorable discharge from the United States Army. For this reason, I had to get shots of epidurals in my back to ease the pain and take prescribed medication since the injury from the military. Furthermore, a higher rating from Veterans Affairs was just recently awarded for degenerative disc disease because of worsening conditions. I believe a higher rating is entitled because of evidence of worsening conditions. Also I feel as though I was discriminated against at Fort Polk during the process of determining the severity of my disability because other soldiers whom I talked to at Fort Polk received a higher rating than me for the same disability.”

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 sciatica condition as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, is addressed below, in addition to a review of the ratings for the unfitting back pain 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 (ABCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20020904** | | | **VA\* – All Effective Date 20021213** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain w/L5 – S1 HNP | 5293 | 10% | HNP L5 – S1 w/Left Sciatica\* | 5293-5292\* | 20% | STRs |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 1/Not Service Connected x 3 | | | STRs |
| **Combined: 10%** | | | **Combined: 20%** | | | |

\*CI did not report for VA C&P Exams on 2/10/03. Code and diagnosis changed by VARD of 9/9/08 to DDD, Lumbar Spine w/HNP L5-S1 and Left Sciatica, 5243, without rating increase. A separate rating for radiculopathy was added effective 7/6/2010.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-aggravated condition continues to burden him. It is a fact, however, that 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. This role and authority is granted by Congress to the Department of Veterans' Affairs (DVA). The DVA, operating under a different set of laws (Title 38, United States Code), 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 his 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 6044.40, 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. The Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected DES improprieties in the processing of his case.

The Board notes that the 2002 Veteran Administration Schedule for Rating Disabilities (VASRD) standards for the spine, which were in effect at the time of separation, were changed to the current §4.71a rating standards in 2004. The 2002 standards for rating based on range-of-motion (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 and when the VASRD 2002 code 5292 (for limitation of motion, lumbar spine) is applicable, the Board reconciles (to the extent possible) its opinion regarding degree of severity for 5292 with the objective thresholds specified in the current §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.

Low Back Pain with L5-S1 HNP Condition. The CI experienced the onset of low back pain associated with pain radiating into the left leg beginning in March 2000. Magnetic resonance imaging demonstrated a herniated intervertebral disc at L5-S1. However examinations documented preserved strength and reflexes and non-surgical treatment was pursued. At the time of an orthopedic examination on 6 November 2001, the CI reported back pain with occasional left lower extremity radicular pain symptoms. The CI was able to flex forward reaching the hands to the ankles. Strength and reflexes were normal, and straight leg raising was negative at that time. Continued non-surgical treatment was advised and a permanent L2 profile was established. Persisting pain symptoms interfering with performance of duties subsequently prompted initiation of MEB. The MEB NARSUM, 9 August 2002 recorded persisting radiating pain with activity. On examination, there was tenderness in the left gluteal region and the left straight leg raise was positive. There was no muscle weakness or atrophy, and reflexes and sensation were intact. A physical therapy range of motion examination performed 5 August 2002 demonstrated flexion of 40 degrees, extension of 10 degrees, side bending of 20 degrees bilaterally, and rotation of 25 degrees bilaterally. As noted previously, the Board must correlate the above clinical data with the 2002 rating schedule (applicable diagnostic codes include: 5292 limitation of lumbar spine motion; 5293 intervertebral disc syndrome; and 5295 Lumbosacral strain). The PEB coded the condition 5293 for intervertebral syndrome but likely applied the USAPDA pain policy. The VA assigned a 20% rating based on moderate limitation of motion shown on the MEB examination (the CI did not report for scheduled C&P examination), coded 5293-5292 (5293 intervertebral disc syndrome – 5292 limitation of motion). The Board agreed that the range of motion documented at the time of the MEB physical therapy examination supported the 20% under the VASRD diagnostic code 5292 in effect at the time as well as current VASRD guidelines. The Board next considered whether a higher rating was warranted under the guidelines for intervertebral syndrome, code 5293. The CI had intervertebral disc disease with radicular symptoms but without objective neurologic findings. Board members agreed the absence of objective neurologic findings did not support the 60% rating under the 5293 diagnostic code. The Board deliberated whether the CI’s back condition more nearly approximated moderate with recurring attacks (20%) or severe with recurring attacks with little intermittent relief (40%). No care for exacerbations was documented in the service treatment records and there are no VA treatment records for back pain in the months after separation (it is unknown if received care elsewhere or he did not require care). The MEB NARSUM examiner characterized the pain as “slight” under the AMA guidelines and ibuprofen was the only medication listed in service treatment records for pain. Board members concluded that using the guidelines under 5293, the CI’s back condition more nearly approximated the mild to moderate rating. There were no incapacitating episodes that warranted consideration under the VASRD criteria for rating that became effective prior to the CI’s separation. The Board also considered the rating under the code, 5295, lumbosacral strain but concluded the preponderance of evidence did not support a rating higher that the 10% rating assigned by the PEB. After due deliberation, considering all of the evidence, and IAW §4.3 (reasonable doubt), the Board concluded that there was sufficient cause to recommend a separation rating of 20% for the back pain condition, coded 5293.

Contended PEB Conditions. The contended condition adjudicated as not separately unfitting by the PEB was left sciatica. The MEB forwarded the herniated nucleus pulposus L5-S1 “with sciatica on the left”. The PEB noted the absence of significant neurologic abnormality. The VA also subsumed the radiating pain without objective neurologic changes under a single rating. The Board’s first charge with respect to this condition 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 presence of functional impairment with a direct impact on fitness is the key determinant in the Board’s decision to recommend any condition for rating as additionally unfitting. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. Examinations consistently demonstrated intact strength, sensation and reflexes. 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 left sciatica condition; 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 low back pain condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the low back pain with L5-S1 HNP condition, the Board unanimously recommends a disability rating of 20%, coded 5293 IAW VASRD §4.71a. In the matter of the contended left sciatic condition, the Board unanimously recommends no change from the PEB determination as not separately 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, effective as of the date of his prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Low Back Pain with L5-S1 HNP | 5293 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110922, 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 XXXXXXXXXXX, AR20120010155 (PD201100853)

1. 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 to modify the individual’s disability rating to 20% without recharacterization of the individual’s separation. This decision is final.

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.

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 XXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA