RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100915 SEPARATION DATE: 20071219

BOARD DATE: 20120531

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (68R / Veterinary Food Inspector), medically separated for spinal fusion / chronic low back pain (L5/S1)*.* 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). He appealed to the MEB regarding his spine measurements and heel spurs and tibial stress fractures which were not on the Physical Profile. Physical Profile changes were accomplished with denial of new spine measurements. Lumbago was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Four other conditions (anxiety disorder, hypertension, stress reactions/fractures and bilateral heel spurs), as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The CI appealed the range of motion (ROM) test results to the MEB arguing that the physical therapist incorrectly conducted his spinal ROM. The MEB noted his appeal and non-concurred, as “ROM measurements shows you have marked restrict [*sic*].” The Informal PEB (IPEB) adjudicated the lumbago as unfitting, redefining it as spinal fusion / chronic low back pain (L5/S1), rated 10%; with likely application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “My spine was severely injured while on a combat tour in Iraq. After a spinal fusion and several intensely painful procedures, my only further treatment option was another surgery with a high risk of paralysis. As a result of my injury, I am in constant pain; have restricted mobility; my left leg and foot experience numbness; and I have PTSD [post-traumatic stress disorder]. The Army separated me from my military career with a 10% disability for the spinal injury. Because of the nature and severity of my career ending injury, I was shocked upon hearing the results of my Physical Disability Board. I was advised that an appeal would be time consuming and most likely wouldn't change my results and that I would be more accurately awarded by the Veterans Association. The Veterans Association immediately awarded me 50% disability for my injuries.”

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 left leg and foot conditions as well as the PEB Mental disorder of Anxiety Disorder (contended PTSD) requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, are addressed below, in addition to a review of the Service rating for the unfitting spine condition.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service XPEB – Dated 20070918** | | | **VA (1 Mo. Pre-Separation) – All Effective Date 20071220** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Spinal fusion | 5241 | 10% | Spinal fusion L5/S1 | 5241 | 40% | 20071102 |
| Anxiety disorder | Not Unfitting | | Post traumatic stress disorder with anxiety | 9411 | 30% | 20071101  & treatment records |
| Hypertension | Not Unfitting | | Hypertension | 7101 | 0% | 20071102 |
| Stress reactions / fractures [tibial] | Not Unfitting | | Bilateral stress fractures | NSC | | |
| Bilateral heel spurs | Not Unfitting | | Bilateral heel spurs and plantar fasciitis | 5299-5276 | 0% | 20071102  & treatment records |
| ↓No Additional MEB/PEB Entries↓ | | | Not Service Connected x 1 | | | 20071102 |
| **Combined: 10%** | | | **Combined: 50%** | | | |

\* VA rating of PTSD changed from 10% to 30% after review of Notice of Disagreement on VARD dated 20090702 w/ eff date of 20071220. Bilateral heel spurs and plantar fasciitis added on VARD dated 20090702 w/ eff date of 20071220.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention suggesting that Service ratings should have been conferred for other conditions documented at the time of separation, some of which were evaluated and determined not to be individually unfitting for continued service. The Board wishes to clarify that it is subject to the same laws for Service disability entitlements as those under which the Military Disability Evaluation System (MDES) operates. The Military Disability Evaluation System (MDES) is responsible for maintaining a fit and vital fighting force. While the MDES 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 Veteran 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 re-evaluate said conditions for the purpose of adjusting the veteran’s disability rating should his degree of impairment vary over time. The Board is empowered to evaluate the fairness of Service fitness determinations, and to make recommendations for Service rating of conditions which it concludes would have independently prevented the performance of required duties (at the time of separation). The Board’s threshold for countering MDES 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.

Spinal fusion / chronic low back pain (L5/S1). The CI had trauma that caused back pain and an L5-S 1 radiculopathy confirmed by electrophysiological (EMG) study. He underwent an L5-S 1 fusion in April 2006. He had continuing low back pain that was not responsive to physical therapy, epidural steroid injections, and RF (radio frequency) ablation and was on narcotic pain medications, nerve pain medication (Neurontin), muscle relaxants, and sleeping medication. The CI reasonably refused additional spine surgery. 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.

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| Thoracolumbar ROM | PT / MEB ~6 Mo. Pre-Sep | VA C&P ~1 Mo. Pre-Sep |
| Flexion (90⁰ Normal) | 35/35/35⁰ | 20⁰ post-repetition 15⁰ |
| Combined (240⁰) | 105⁰ | 155⁰ |
| Comment | Tenderness; no spasm; heel-toe walk normal; strength/reflexes normal; NARSUM “decreased ROM, especially noticeable in flexion”; 0/5 Waddell signs; SLR without radiation of pain; referenced PT ROMs above with pain *(see text)* | Gait antalgic; +tender lower TC spine and SI regions; + SLR bilaterally; no muscle spasm; normal contour; repetitive use additionally limits function by 15⁰; no signs of permanent nerve root involvement |
| §4.71a Rating | 20% | 40% |

At the MEB exam, the CI reported continuing pain, left leg radiculopathy (paresthesias) and functional limits. The MEB physical exam noted tenderness and decreased ROMs as charted above. The CI appealed the MEB specifying that the ROMs were incorrect as “During the flexion ROM test of the spine, the physical therapist performing the test, applied pressure to my upper back once I had reached what I considered an intolerable level of pain. The result of this physically assisting me during the test produced a greater degree of flexion than I was able to tolerate.” The appeal was noted, bit the request for a new ROM was “Non-Concur. Your ROM measurements shows you have marked restrict. Your appeal will be part of your PEB packet.”

At the VA Compensation and Pension (C&P) exam prior to separation, the CI reported a similar history with left lower extremity paresthesias, pain of 9/10 with no incidents of incapacitation over the past year. The VA exam indicated an abnormal gait, tenderness with no spasm, and bilateral straight leg tests. ROM is charted above. Forward flexion was measured at 20⁰, however, the examiner stated “The joint function of the spine is additionally limited by the following after repetitive use: pain, fatigue, weakness, lack of endurance and pain has the major functional impact. It is not additionally limited by the following after repetitive use: incoordination. The above additionally limit the joint function by 15 degrees.” An addition VA exam, 30 months remote from separation indicated nearly identical ROMs to the first VA exam with forward flexion of 29⁰ (30⁰) for rating at 40%.

The Board directs attention to its rating recommendation based on the above evidence. Appropriately rating the back in this case is determined by the ROM measurements and the Board deliberated on the weighting of the two exams and the entirety of the record. The PEB specified “restricted to 35⁰ flexion … by pain alone” (20% VASRD criteria), but rated 10%, based on tenderness. This was likely application of the USAPDA pain policy for rating. Additionally, the historic Army guidance on ROM testing for mechanical limitation and rating on passive ROM was discussed. The DCCS negative response to the CI’s appeal regarding ROM testing was therefore reasonable at that time; however, it places reasonable doubt on if the ROMs were true active ROM or passive ROM measurements. The VA exam was closer to the date of separation and was assigned a higher probative value for rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 40% for the spine fusion condition.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were history of stress reaction/fractures (bilateral tibia), bilateral heel spurs, and anxiety disorder. 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.

History of stress reaction/fractures (bilateral tibia) and bilateral heel spurs. Both lower extremity conditions were profiled as “Heel spurs. Shin pain.” There was significant potential overlap with the unfitting spine fusion condition’s impact on abnormal gait and the L3 profile restriction. The PEB specified the unfitting spinal fusion condition had no radiculopathy. There was no fixed motor loss or sensory loss noted proximate to separation; and pain, with or without radiation is considered under the general spine rating above. The commander’s statement specifically mentioned the back injury and general profile restrictions as impacting duty performance. None of the lower leg conditions were judged to fail retention standards. There was no indication from the record that any lower leg 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 any of the lower extremity contended conditions; and, therefore, no additional disability ratings can be recommended for either the stress reaction/fractures (bilateral tibia) or the bilateral heel spurs.

Anxiety disorder. The Board considered that both the PEB’s anxiety disorder and the CI’s noted VA PTSD diagnosis are mental health conditions with similar standards of fitness and use the same VA rating criteria of §4.130. The specific mental health diagnosis (between these two diagnoses) was not material to the Board proceedings. The CI’s mental health disorder (anxiety disorder condition) had a complex history with symptoms of poor sleep (significant sleep deficits) and nightmares that began while deployed to OIF in 2005. Following return from deployment the CI’s sleep problems and nightmares did not respond to medications. The CI related his anxiety to a history of childhood kidnapping (traumatic at age 7) and sexual abuse, and the trigger of feeling at risk of being kidnapped while deployed. The CI additionally had hypervigilance, flashbacks to abuse as a child and panic attacks that were related to back-pain and disability processing. He was undergoing a divorce following redeployment that he attributed to his wife discovering his childhood background.

The MEB examiner, five months pre-separation, diagnosed “Anxiety disorder, not otherwise specified (NOS), as manifest by some post traumatic stress symptoms related to a childhood kidnapping experience, which appears to be temporarily exacerbated by his Iraq deployment.” The condition was considered to have existed prior to service (EPTS) without permanent aggravation. Impairment was considered none for military duty and mild for social and vocational adaptability. The global assessment of functioning (GAF) was 68, in the range of mild symptoms. The examiner recommended no psychiatric profile or restrictions, but recommend a review of the CI’s pain management “in light of his (CI) long history of polydrug abuse prior to service. Narcotics have multiple side effects and often cause problems with mood, irritability, bad dreams, etc.”

At the VA Compensation and Pension (C&P) exam, one month prior to separation, the CI reported intrusive thoughts and flashbacks, lack of focus, isolation, anger outbursts and fighting, nightmares and trouble sleeping. The history was similar to the MEB history. The CI was still employed (in service) and separated from his wife. Mental status exam demonstrated an abnormal affect and mood. The examiner stated “he is highly emotionally liable; anger is his worst problem.” Communication, speech, concentration and memory were normal. There were no panic attacks, suspiciousness, or delusions. Suicidal/homicidal ideation was absent and there was no evidence of psychosis. The examiner’s findings stated “He currently has nightmares nightly, intrusive thoughts, flashbacks, avoidance, numbing, startle response, hypervigilance and emotional lability with anger and fighting.” The GAF was 65-70 (MEB=68), connoting mild symptoms and the examiner stated “The best description of the claimant's current psychiatric impairment is: psychiatric symptoms are mild or transient but cause occupational and social impairment with decrease in work efficiency and occupational tasks only during periods of significant stress.” The VA rated this exam at 10%, and on appeal, retroactively increased the rating to 30%. The increase to 30% (VARD 20090702) was based on resolution of reasonable doubt and VA treatment records from May 2008 to April 2009. The CI initially sought VA treatment in May 2008 (5 months post-separation), with a visit to the Psychiatric Emergency Department. Treatment notes indicated symptom worsening, treatment and medication use. A VA C&P exam from June 2010, 2.5 years post separation, indicated worsening of symptoms to include hallucinations and a GAF of 50 (serious symptoms), but was outside the range to provide substantive information about the CI at the time proximate to separation.

The Board directs attention to its recommendation based on the above evidence, with the principle discussion focused on making a fitness determination. The commander’s statement mentioned only the back injury and general profile restrictions as impacting duty performance. The profile was S1 and no mental disorder was judged to fail retention standards. The commander’s statement, profile and NARSUM were 4-5 months prior to separation, and did not assess any changes that may have occurred prior to separation. The severity of the CI’s mental health condition as evidenced by the MEB evaluation could best be described as mild. The VA exam 1 month pre-separation indicated continued mild symptoms, while post-separation VA treatment records indicated symptom worsening. There was no indication from the record that any mental health symptoms significantly interfered with satisfactory duty performance in garrison; however, the Board discussed the requirements of the CI’s MOS (68R / Veterinary Food Inspector) and potential non-deployability based on his triggers of fear of kidnapping, etc. After due deliberation in consideration of the preponderance of the evidence, the Board majority concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the mental disorder condition; and, therefore, no additional disability ratings can be recommended for the anxiety disorder 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. As discussed above, PEB reliance on the USAPDA pain policy for rating the spine condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the spinal fusion condition, the Board unanimously recommends a disability rating of 40%, coded 5241 IAW VASRD §4.71a. In the matter of the contended history of stress reaction/fractures (bilateral tibia) and bilateral heel spurs conditions, the Board unanimously recommends no change from the PEB determinations as not unfitting. In the matter of the contended history of the Anxiety Disorder, conditions, the Board by a vote of 2:1 recommends no change from the PEB determinations as not unfitting. The single voter of dissent (who recommended an unfit determination with TDRL rating of 50% in retroactive compliance with VASRD §4.129, and a 30% permanent rating at 6 months IAW VASRD §4.130) submitted the addended minority opinion. 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** |
| Spinal fusion L5/S1 (claimed as chronic low back pain) | 5241 | 40% |
| COMBINED | 40% |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110928, 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

MINORITY OPINION. In addition to the CI’s spinal fusion condition 40% rating, the CI should also be found unfit and rated for his mental health condition. Treatment records indicated a history of PTSD, and a final diagnosis of anxiety disorder, NOS. The CI had no mental health symptoms on entry into service, or during service prior to his deployment to Iraq. The CI’s symptoms of anxiety, poor sleep (significant sleep deficits), nightmares, hypervigilance and flashbacks to abuse as a child were related to his childhood kidnapping and the trigger of feeling at risk of being kidnapped while deployed. The panic-like symptoms attributed to his back pain, and use of narcotic pain medications likely overlapped and adversely impacted his “post traumatic stress symptoms related to a childhood kidnapping experience”. The CI’s pending divorce was attributed to his mental health disorder as well.

The CI’s symptoms and triggers would nearly certainly resurface and be exacerbated by almost any deployment and would therefore make the CI non-deployable. He would likely function well in garrison, but not in wartime duties. Given his 68R MOS, the CI should be found unfit due to his mental health disorder. It is conceded that the initial childhood stressor was EPTS, but the CI was asymptomatic as an adult prior to deployment. The NARSUM assessment of only temporary exacerbation (no permanent aggravation) was speculation and later VA records indicate that the condition was not temporary, but permanently aggravated.

Although independent rating of the CI at the time of the NARSUM would be 10% IAW VASRD §4.130 rating criteria, the tenants of VASRD §4.129 should be applied for a mental disorder that develops in service as a result of a highly stressful event, and a constructive six month TDRL 50% rating should be applied. The permanent rating at the six month time frame, aligns with the later VA treatment notes and would appropriately be 30% for occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal).

I strongly recommend that the anxiety disorder be considered as unfitting and that the CI’s prior determination be modified as follows: TDRL at 70% for six months following CI’s prior medical separation (anxiety disorder at minimum of 50% IAW §4.129) and then a permanent combined 60% disability retirement as below.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** | |
| **TDRL** | **PERMANENT** |
| Spinal fusion L5/S1 (claimed as chronic low back pain) | 5241 | 40% | 40% |
| Anxiety Disorder | 9413 | 50% | 30% |
| **COMBINED** | **70%** | **60%** |

AR20120011859, XXXXXXXXXXXX

Dear XXXXXXXXXXXX:

I accept the recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) to recharacterize your separation as a disability retirement with the combined disability rating of 40% effective the date of your medical separation for disability with severance pay. Enclosed is a copy of the Board’s recommendation and record of proceedings for your information.

The recharacterization of your separation as a disability retirement will result in an adjustment to your pay providing retirement pay from the date of your original medical separation minus the amount of severance pay you were previously paid at separation.

The accepted DoD PDBR recommendation has been forwarded to the Army Physical Disability Agency for required correction of records and then to the U.S. Defense Finance and Accounting Service to make the necessary adjustment to your pay and allowances. These agencies will provide you with official notification by mail as soon as the directed corrections have been made and will provide information on your retirement benefits. Due to the large number of cases in process, please be advised that it may be several months before you receive notification that the corrections are completed and pay adjusted. Inquiry concerning your correction of records should be addressed to the U.S. Army Physical Disability Agency, 2900 Crystal Drive, Suite 300, Arlington, VA 22202.

A copy of this decision has also been provided to the Department of Veterans Affairs.

Sincerely,

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Deputy Assistant Secretary

(Army Review Boards)

Enclosure