RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100940 SEPARATION DATE: 20020227

BOARD DATE: 20120925

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve PFC/E-3 (92A10/Automated Logistical Specialist), medically separated for chronic back pain. The CI injured his back in a fall with a 60 pound rucksack while in Basic Training. Despite rehabilitative treatment, he developed chronic low back pain (LBP) and radiculopathy and was unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). High frequency hearing loss, identified in the rating chart below, was also identified and forwarded by the MEB. The Physical Evaluation Board (PEB) adjudicated the chronic back pain condition as unfitting, rated 0%, with presumed application of the US Army Physical Disability Agency (USAPDA) pain policy. The high frequency hearing loss was determined to be not unfitting. The CI made no appeals, and was medically separated with a 0% disability rating.

CI CONTENTION: “I feel that the degree of awarded disability caused by this injury has affected my ability to perform as a civilian and husband greater than 0%. The VA has currently rated my disability and related residuals to my back injury at 60%, with an overall disability of 70% once I add an unrelated issue. (Continues in block 12.) and physically, daily, I am limited in employment opportunities as most jobs require some form of physical activity or mental activity. My medication affects my mental ability and my physical difficulties make me less useful as a team member. I can’t travel for work which affects promotions and raises. I can’t make love to my wife. The PDRB rated me at 0%, but VA immediately rated at 40%. I had a single traumatic injury (a fall) right at the end of basic training, during an FTX. I persevered through the exercise despite severe pain and graduated. It was almost 2 months later that an MRI revealed ruptured &bulged disks, resulting in my discharge. I feel that it’s [*sic*] effect on my quality of life is greater than 0%.”

Undated personal statement addressed to the members of the PDBR Board, received 03 November 2011: “Within a few months of my discharge due to a back injury/Degenerative disc disease (discogenic injury caused by the LOD injury) I was rated by VA at 40% for that injury alone, and within a year after that rating an increase of 10% was granted for residual nerve damage, effective Sept 2002. Please review the included materials and my VA records and adjudicate accordingly.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in the Department of Defense Instruction (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.” The only contended condition that is within the scope of the Board is radiculopathy. Although depression and erectile dysfunction were service connected by the VA as related to the back condition, these conditions were not addressed 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 Correction of Military Records.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20020109** | **VA (~2 Mos. Post-Separation) – All Effective Date 20020228** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain | 5299-5295 | 0% | Intervertebral Disc Syndrome, Lumbar Spine | 5293 | 40% | 20020427 |
| High Frequency Hearing Loss | Not Unfitting | NSC |
| **Combined: 0%** | **Combined: 40%\*** |

\*Bilateral tinnitus 6260 added at 10% effective 20030827. Radiculopathy of right lower extremity coded 5293-8520, exam 20030305, rated 10% effective 20020923. Erectile dysfunction 7599-7522 added at 0% effective 20100831. Major depressive disorder (claimed as depression and chronic pain) associated with intervertebral disc syndrome, lumbar spine added at 30% effective 20110518 and increased to 50% effective 20111011. Obstructive sleep apnea 6847 added at 50% effective 20111019 but was reduced to 0%. Final combined rating 80% effective 20111011.

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 also acknowledges the CI’s contention that suggests ratings should have been conferred for other conditions documented at the time of separation. 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 member's medical conditions, compensation can only be offered for those medical conditions that cut short a 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 connected conditions and to periodically reevaluate 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 6040.44, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation and is limited to conditions adjudicated by the PEB as either unfitting or not unfitting. 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 Back Pain Condition. There were two goniometric range-of-motion (ROM) evaluation 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 | VA C&P ~2 Months Post-Separation | VA C&P ~12 Months Post-Separation |
| Flexion (90⁰ Normal) | 60⁰ (pain at 25-30 degrees) | 50⁰ (pain at 35-40 degrees) |
| Extension (0-30) | 0⁰ | 5⁰ |
| Right Lateral Flex (0-30) | 25⁰ | 20⁰ |
| Left Lateral Flex 0-30) | 25⁰ | 20⁰ |
| Right Rotation (0-30) | 25⁰ | 25⁰ |
| Left Rotation (0-30) | 25⁰ | 25⁰ |
| Combined (240⁰) | 160° | 145° |
| Comment | Absolutely zero extension, very painful and cannot extend. After 3 repetitions of flexion, he “simply had to quit.” No extensions. Able to do 5 repetitions of bilateral bending and rotations. Considerable pain on palpation of left side of the low back in the L4-5 area--almost dropped to the floor when palpated. About 50% of this level of pain with palpation on the right side. Sharp and dull sensation blunted in the right large toe and maybe the dorsum of the foot, but grossly intact on other toes, lower leg and thigh. Reflexes 1+ and equal bilateral lower extremities. | After 3 repetitions of flexion, he had to quit due to increased pain and fatiguing. Able to do 5 reps of 5 degrees extension. Able to perform lateral bending to 20 degrees 5 times with mild to moderate discomfort on the left side on 4th and 5th reps. Sharp and dull sensations intact in bilateral lower extremities with vague decreased sensation on the lateral aspect of the right lower leg. Reflexes 1+ bilaterally at knees. |
| §4.71a Rating |  |  |
| 5292 | 20% moderate limitation of motion | 20% moderate limitation of motion |
| 5293 | 20% moderate recurring attacks | 20% moderate recurring attacks |
| 5295 | 10% characteristic pain on motion | 10% characteristic pain on motion |

The MEB narrative summary (NARSUM) of 4 October 2001 did not include a physical examination. The examination documented lumbar spine X-ray finding of possible disc space narrowing of L5-S1 performed 11 July 2001. It also documented that an magnetic resonance imaging (MRI) performed on 3 August 2001 showed an anterior extradural defect on the right and inferior to the interspace compatible with disc herniation and a possible disc fragment with displacement of the right S1 nerve root. A NARSUM addendum performed on 19 December 2001 referenced the MEB history and physical examination performed 27 August 2001 and a neurosurgical evaluation performed on 22 August 2001. The MEB history and physical documented decreased ROM spine without specifying numerical values. The neurosurgery evaluation documented lumbar ROM full ROM including flexion, lateral bending, rotation, and extension. However, it also failed to include numerical values. At a VA Compensation and Pension (C&P) exam performed 2 months after separation, the CI reported back pain daily with shooting pain and numbness in his right leg periodically throughout the day. This occurred at least once a day and usually occurred a couple to a few times a day. He was taking Elavil, Robaxin, and Flexeril. His pain was worse in the morning and he also had stiffness in the morning that would resolve as the day went on. He had been working for approximately a month and a half at the time of the C&P exam and reported he had not missed any work due to his back condition. At the time of a follow-up C&P examination approximately one year after separation, he reported he had missed some work because of his back and was on light duty.

The Board directs attention to its rating recommendation based on the above evidence. The 2001 Veterans Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, were modified on
23 September 2002 to add incapacitating episodes (5293 Intervertebral disc syndrome), and then changed to the current §4.71a rating standards on 26 September 2003. The 2001 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 2001 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:

Pronounced; with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc, little intermittent relief........................................................... 60

Severe; recurring attacks, with intermittent relief 40

Moderate; recurring attacks................................ 20

Mild..................................................................... 10

Postoperative, cured........................................... 0

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 osteoarthritic 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

Lumbar spinal flexion limited to 60 degrees or less, a loss of one third of the full range, is appropriately described as a moderate limitation of motion and this would warrant a 20% rating under 2001 VASRD code 5292. If this finding was rated using today’s VASRD, a 20% rating would also be warranted based on flexion not greater than 60 degrees. While the VA applied a 40% rating for 5293 Intervertebral disc syndrome, severe; recurring attacks, with intermittent relief, the evidence does not support this characterization. The record supports moderate symptoms of intervertebral disc syndrome with recurring attacks. The CI had constant pain and exacerbations at least once a day and sometimes multiple times per day. However, these flares or attacks did not cause him to miss any work prior to the first C&P exam. He did report missing some work at the time of the second VA C&P examination and was on light duty. However, this does not appear to be a significant amount of missed work days and the description of symptoms does not reach the level that could be characterized as severe. Therefore a rating of 20% would also be warranted if the 2001 VASRD code 5293 is utilized. Under the 2001 VASRD code 5295 a rating greater than 10% is not warranted as the CI did not have muscle spasms noted on examination. The evidence does not support a rating greater than 20% under any code. 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 chronic back pain condition.

Contended PEB Conditions. The contended condition adjudicated as not separately unfitting by the PEB was 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. This condition was not profiled and was not implicated in the commander’s statement. It was reviewed by the action officer and considered by the Board. There was no indication from the record that this condition significantly interfered with satisfactory duty performance. The 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. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The sensory component in this case, as present in the VA C&P examination, has no functional implications. A motor impairment was noted only on one treatment record, was relatively minor, and cannot be linked to significant physical impairment. As no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. 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 radiculopathy 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. In the matter of the chronic back pain condition, the Board unanimously recommends a disability rating of 20%, coded 5293 IAW VASRD §4.71a. In the matter of the contended radiculopathy condition, the Board unanimously recommends no change from the PEB determination 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, effective as of the date of his prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Intervertebral Disc Syndrome, Lumbar Spine | 5293 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110910, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXX, AR20120018091 (PD201100940)

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 XXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA